

83-284

Office-Supreme Court, U.S.  
FILED

AUG 22 1983

ALEXANDER L. STEVAS,  
CLERK

NO. \_\_\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION,

Petitioners,

vs.

HYOSUNG AMERICA, INC.,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

ROBERT J. DAVIS  
LAW OFFICES OF ROBERT J. DAVIS  
ALFRED A. CALABRO  
CALABRO, CALABRO & CALABRO

BY: ALFRED A. CALABRO

124 South Isabel Street  
Glendale, CA 91205  
(213) 245-1846; 240-4812

Attorneys for Petitioners

## QUESTIONS PRESENTED

Petitioners sought an order staying the judgment of the district court under Rule 62(b), F.R.C.P., to prevent the expiration of the appeal period prescribed by Rule 4(a), F.R.A.P., pending resolution of Petitioner's motion to vacate the judgment under Rule 60(b), F.R.C.P.

1. Does the district court order of November 24, 1982, staying the "case and judgment" toll the running of the appeal period provided by Rule 4(a), F.R.A.P., pending resolution of a motion to vacate the judgment under Rule 60(b), F.R.C.P.?

2. Does the appellate court have jurisdiction over an appeal untimely filed where, in reliance upon the district court's order staying the judgment

and the case, Petitioners filed a Notice of Appeal after the expiration of the appeal period but within the new deadline they reasonably assumed the stay provided?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vii
OPINION BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	17
1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO THE PROPER INTERPRETATION OF RULE 62(b), F.R.C.P.	17
2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING APPELLATE JURISDICTION BASED ON THE UNIQUE CIRCUMSTANCES DOCTRINE.	21
CONCLUSION	28
DECLARATION OF ALFRED A. CALABRO	29
APPENDIX A NOTICE OF ENTRY, UNITED STATES DISTRICT COURT, CENTRAL DIS- TRICT OF CALIFORNIA, Dated Oct. 29, 1982	A-1

APPENDIX B

EX PARTE MOTION TO VACATE ENTRY  
OF JUDGMENT OR IN THE ALTERNA-  
TIVE TO CHANGE THE DATE OF THE  
ENTRY OF JUDGMENT, UNITED  
STATES DISTRICT COURT

B-1

APPENDIX C

DECLARATION OF ROBERT J. DAVIS  
Executed on Nov. 10, 1982

C-1

APPENDIX D

MOTION FOR ORDER VACATING  
JUDGMENT, TO PERMIT CONSIDERA-  
TION OF DEFENDANTS' OBJECTIONS  
TO FINDINGS OF FACT, CONCLUSION  
OF LAW, AND JUDGMENT, AND IF  
SUCH BE DENIED TO PERMIT DEFEN-  
DANTS TO FILE MOTION FOR NEW  
TRIAL, Lodged Nov. 22, 1982

D-1

APPENDIX E

EX PARTE - APPLICATION FOR  
ORDER SHORTENING TIME AND  
DECLARATION IN SUPPORT THEREOF  
AND REQUEST FOR STAY AND POINTS  
AND AUTHORITIES, Lodged Nov.  
22, 1982

E-1

APPENDIX F

DECLARATION OF ALFRED A.  
CALABRO, ESQ., FOR ORDER SHORT-  
ENING TIME, Signed Nov. 20,  
1982

F-6

APPENDIX G

MINUTES OF COURT ORDER STAYING  
JUDGMENT, UNITED STATES DIS-  
TRICT COURT, CENTRAL DISTRICT  
OF CALIFORNIA, Dated Nov. 24,  
1982

G-1

APPENDIX H

MINUTES OF HEARING DENYING  
DEFENDANT'S MOTION TO VACATE  
ENTRY OF JUDGMENT, UNITED  
STATES DISTRICT COURT, CENTRAL  
DISTRICT OF CALIFORNIA, Dated  
Dec. 13, 1982

H-1

APPENDIX I

NOTICE OF APPEAL ON BEHALF OF  
DEFENDANTS, UNITED STATES  
DISTRICT COURT, CENTRAL DIS-  
TRICT OF CALIFORNIA, Filed Dec.  
13, 1982

I-1

APPENDIX J

MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, TO LIMIT APPELLATE  
JURISDICTION, UNITED STATES  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT, Dated April 15, 1983

J-1

APPENDIX K

OPPOSITION TO MOTION TO DISMISS  
OR, IN THE ALTERNATIVE, TO  
LIMIT APPELLATE JURISTDCTION,  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT, DATED  
May 2, 1983

K-1

APPENDIX L

ORDER, UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT,  
Filed May 24, 1983

L-1

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
Alvestad v. Monsanto Co. (5th Cir. 1982) 671 F.2d 908	23
Browder v. Director, Illinois Dept. of Corrections (1978) 434 U.S. 257, 98 S.Ct. 556 54 L.Ed.2d 521	17, 19, 20
Butler's Tire & Battery Co., Inc., Estate of (9th Cir. 1979) 592 F.2d 1028	25
Carlile v. South Routt School District RE3-J (10th Cir. 1982) 652 F.2d 981	26
Catlin v. United States (1945) 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911	16
Chipser v. Kohlmeyer & Co. (5th Cir. 1979) 600 F.2d 1061	23, 26
Contemporary Mission, Inc. v. United States Postal Serv. (2d Cir. 1981) 648 F.2d 97	19



Hanna v. Plumer (1965) 380 U.S. 460, 85 S.Ct. 1136 14 L.Ed.2d 8	21
Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc. (1962) 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261	22
Hernandez-Rivera v. Immigration and Naturalization Serv. (9th Cir. 1979) 630 F.2d 1352	25
Inglese v. Warden, U. S. Penitentiary (11th Cir. 1982) 687 F.2d 362	26, 27
Jung v. K. & D. Mining Co. (1958) 365 U.S. 333, 78 S.Ct. 764, 2 L.Ed.2d 806	16
Kirtland v. J. Ray McDermott & Co. (5th Cir. 1978) 568 F.2d 1166	20
LaBuy v. Howes Leather Co. (1956) 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290, rhrq. den. 352 U.S. 1019, 77 S.Ct. 553	21
Lieberman v. Gulf Oil Corp. (2d Cir. 1963) 315 F.2d 403	23, 26

Martinez v. Trainor (7th Cir. 1977) 556 F.2d 818	24
National Industries Inc. v. Republic National Life Insurance Co. (9th Cir. 1982) 677 F.2d 1258	25
Needham v. White Laboratories (7th Cir. 1981) 639 F.2d 394	24, 26
Paxman v. Wilkerson (4th Cir. 1974) 502 F.2d 1163 (table) 18 Fed.R.Serv.2d 1554	18
Petrol Stops Northwest v. Continental Oil Co. (9th Cir. 1981) 647 F.2d 1005, cert.den. 454 U.S. 1098, 100 S.Ct. 672	19
Rosenberg Bros. & Co., Inc. v. Curtis Brown Co. (1923) 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372	16, 22
Seshachalam v. Creighton Univ. School of Medicine (8th Cir. 1976) 545 F.2d 1147, app. dismiss. 549 F.2d 79, cert. den. 433 U.S. 909, 97 S.Ct. 2974, 53 L.Ed.2d 1093	24

Thompson v. Immigration and Naturalization Service (1964) 375 U.S. 385, 84 S.Ct. 397, 11 L.Ed.2d 404	17, 22, 27
United States v. F. & M. Schaefer Brewing Co. (1958) 356 U.S. 227, 78 S.Ct. 674, 2 L.Ed.2d 721	17
United States v. Velez (11th Cir. 1982) 693 F.2d 1081	24
Weiss v. Hunna (2d Cir. 1963) 312 F.2d 711 cert. den. 374 U.S. 853, 83 S.Ct. 1920 10 L.Ed.2d 1073	19

### Statutes

28 U.S.C. § 1254(1)	2
---------------------	---

### Rules

#### Federal Rules of Appellate Procedure:

Rule 4(a)	i, 10, 15, 20-22
Rule 4(a)(1)	3
Rule 4(a)(5)	4

Federal Rules of Civil Procedure:

Rule 52(a)	8
Rule 58	8
	i, 2, 8, 9, 14
Rule 60(b)	16, 18, 19, 26
Rule 62(b)	i, 3, 9, 15-20

Rules for Practice for the United  
States District Court, Central  
District of California

Rule 7(a)	7, 8
-----------	------

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION,

Petitioners,

vs.

HYOSUNG AMERICA, INC.

Respondent.

---

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

The petitioners, JOHN C. MOON and ZION INDUSTRIAL CORPORATION, respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 24, 1983.

## **OPINION BELOW**

The judgment and order of the Court of Appeals, not yet reported, appears in Appendix L.

## **JURISDICTION**

The judgment of the Ninth Circuit Court of Appeals was entered on May 24, 1983, dismissing Petitioners' appeal from the judgment of the District Court for the Central District of California, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## **STATUTORY PROVISIONS**

Federal Rules of Civil Procedure,  
Rule 60(b)

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding. . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . .

Rule 62(b)

In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of . . . a motion for relief from a judgment or order made pursuant to Rule 60. . . .

Federal Rules of Appellate Procedure,

Rule 4(a)(1)

In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed after the date of entry of the judgment or order appealed from. . . .

Rule 4(a)(5)

The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court requires otherwise.

**STATEMENT OF THE CASE**

This diversity action was brought by Hyosung America, Inc., plaintiff-appellee-respondent (Respondent), against John C. Moon and Zion Industrial Corporation, defendants-appellants-petitioners (Petitioners), seeking specific performance of an agreement to transfer certain property.

After a trial by Court without a jury, the Court announced its decision



in favor of plaintiff. On October 28, 1982, plaintiff through its counsel served a copy of the Proposed Findings of Fact and Conclusions of Law and Proposed Judgment on counsel for Defendants, and on October 29, 1982, filed said documents with the Clerk of the District Court. On that same day, October 29, 1982, the Court signed the Findings of Fact and Conclusions of Law and Judgment, without any opportunity on the part of the Defendants to Object to such Findings, Conclusions and Judgment.

On November 1, 1982, the Clerk of the Court mailed Notice of Entry of the Judgment to the parties through their counsel (App. Exh. A). However, on November 3, 1982, and before receiving the Notice of Entry of Judgment or

otherwise becoming aware that Judgment had in fact been entered, counsel for Defendants served and filed Objections to the Proposed Judgment; Findings of Fact and Conclusions of Law.

On that same day, November 3, 1982, at approximately 4:00 P.M., then sole counsel for Defendants, Mr. Robert J. Davis, Esquire, collapsed in his office and was admitted to the hospital for a possible heart attack or high blood pressure problems. Mr. Davis was later released, ordered to stay away from his office and placed on Atenlonel medication which made him drowsy and dizzy. On November 8, 1982, Mr. Davis returned briefly to his office and learned for the first time that Judgment had been entered on October 29, 1982.

On November 12, 1982, Mr. Davis, on behalf of Defendants filed an Ex Parte Motion to Vacate Entry of Judgment or in the Alternative to Change the Date of Entry of Judgment (App. Exh. B). In his declaration in support of said motion Mr. Davis relates the facts relative to the collapse he suffered in his office (paragraphs 6 and 7), and requested in his declaration that the entry of judgment be vacated or in the alternative that the date of entry of judgment be designated the date the motion was decided (paragraph 10).

In his declaration Mr. Davis further stated that the request was made so the court might consider the Objections filed by Mr. Davis, and that had the Judgment been entered as provided in Local Rule 7(a) there would have been no

need for the motion (paragraph 9). Said motion contended that the judgment was entered prematurely and without notice and thus was void under Rules 52(a), 58, 60(b) of the Federal Rules of Civil Procedure and Rule 7(a) of the local Rules for Practice for the United States District Court, Central District of California (App. Exh. C).

The trial Judge, the Hon. Manuel Real, was absent from the Los Angeles area and was not available to rule on the Ex Parte Motion filed by Mr. Davis on November 12, 1982. Accordingly, on November 22, 1982, 24 days after entry of the judgment, Petitioners filed a formal motion to vacate the judgment under Rule 60(b), F.R.C.P. (App. Exh. D). Petitioners concurrently filed an ex parte application for an order (1) to

shorten time for the hearing on the Rule 60(b) motion, and (2) to stay the judgment of the district court under Rule 62(b), F.R.C.P., pending the hearing on the Rule 60(b) motion (App. Exh. E). Petitioners sought the above orders to preserve the district court's jurisdiction to hear the Rule 60(b) motion and to preserve their right to appeal pending resolution of the motion (App. Exh. F: Declaration of Alfred Calabro, page 4, paragraphs 11, 12, 13).

The trial Judge, the Honorable Manual Real, was still absent from the Los Angeles area, and the motion was referred to another Judge of the District Court, the Honorable Laughlin E. Waters. On November 24, 1982, 26 days after the entry of Judgment, Judge

Waters made the following ex parte order:

"The Court orders the above-entitled case and Judgment hereon are stayed until December 13, 1982." (App. Exh. G).

Counsel for Petitioners believe the date of December 13, 1982, was the expected date of return of Judge Real. In reliance upon the District Court's order staying the Judgment and the case, Petitioners did not file a Notice of Appeal within the 30 day period provided by Rule 4(a), F.R.A.P. Counsel for Petitioners believed that the filing of a Notice of Appeal would have ousted the District Court of jurisdiction, thus preventing any consideration of Petitioners' motion. On December 13, 1982, Judge Real conducted a hearing on Petitioners' Motion pursuant to which Judge

Waters had issued the stay order recited above. At the conclusion of the hearing, Judge Real made the following Order:

"Hearing held and Court denies the Defendants' Motion to Vacate Entry of Judgment or in the Alternative to Change Date of Entry of Judgment." (App. Exh. H)

On that same date, December 13, 1982, Petitioners filed a Notice of Appeal (App. Exh. I). Petitioners contend that by allowing the hearing, Judge Real also impliedly ruled the court had jurisdiction to entertain the motion and that the stay order issued by Judge Waters had effectively stayed the entire case without penalty, consequence or other disadvantage to Petitioners.

On February 25, 1983, a prebriefing conference was held in this matter with conference attorney, Richard G. R.

Schickele, Esquire. A question was raised by the conference attorney concerning the timeliness of the Notice of Appeal filed by Petitioners on December 13, 1982. The Order made by the Court on November 24, 1982, staying the "case and Judgment" was reviewed by all counsel and the conference attorney, and it was the then opinion of counsel for Petitioners that the Order made by the District Court on November 24, 1982, effectively stayed not only the execution of the Judgment, but the entry of the Judgment and all proceedings possible thereunder, including the running of any period for the filing of a Notice of Appeal. Petitioners' counsel fairly believed that by using the words "the above-entitled case and Judgment hereon are stayed" that such language extended



to every facet of the proceedings in the trial Court including the running of the time within which the Notice of Appeal had to be filed. However, counsel for Petitioners wished to more completely review the file and the law and requested from the conference attorney and further action in the matter be deferred until April 1, 1983.

Counsel for Petitioners reviewed the file and conferred with each other concerning the question raised by the conference attorney concerning the timeliness of the Notice of Appeal. It was the opinion of counsel for Petitioners that the order of November 24, 1982, effectively stayed the time for filing the Notice of Appeal and that there was no need to bring any motion in the District Court for that purpose.

Also, there was a question in the minds of counsel for Petitioners whether or not the District Court would have jurisdiction to entertain a motion to clarify the November 24, 1982, order since the Notice of Appeal had probably effectively ended the jurisdiction of the District Court to hear any further motions.

On April 15, 1983, counsel for Respondent elected to file a Motion to Dismiss Petitioners' appeal as untimely, or in the alternative, to limit appellate jurisdiction to review the District Court's order denying the Rule 60(b) motion (App. Exh. J). Petitioners opposed dismissal of the appeal from the judgment on three grounds. (1) The District Court's order staying the judgment and the case until December 13,

1982, tolled the appeal period provided by Rule 4(a), F.R.A.P. (2) The appellate court has jurisdiction to decide an untimely appeal where appellant relied to his detriment on the District Court's assurance that the appeal period had been tolled. (3) The appellate court may remand an untimely appeal to the District Court to determine whether the untimeliness was due to excusable neglect (App. Exh. K).

On May 24, 1983, the appellate court granted Respondent's Motion to Dismiss Petitioners' appeal from the underlying judgment. The court held that the Rule 62(b) stay did not toll the time for appeal. The court did not address the issue of Petitioners' reliance upon conduct of the District Court indicating that the appeal period had been

tolled. The court entered an order limiting appellate jurisdiction to review of the order denying the Rule 60(b) motion (App. Exh. L).

The order dismissing the appeal from the underlying judgment is a final judgment disposing of the case on the merits. **Jung v. K. & D. Mining Co.** (1958) 365 U.S. 333, 78 S.Ct. 764, 2 L.Ed.2d 806; **Catlin v. United States** (1945) 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911; **Rosenberg Bros. & Co., Inc. v. Curtis Brown Co.** (1923) 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372.

The pendency of the appeal from the Rule 60(b) motion does not affect the finality of the order dismissing the appeal from the underlying judgment. Rule 60(b), F.R.A.P.; **Browder v. Director, Illinois Dept. of Corrections**

(1978) 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521.

A petition for Writ of Certiorari is the appropriate procedure to review the appellate court's dismissal of the appeal for lack of jurisdiction. **Thompson v. Immigration and Naturalization Service** (1964) 375 U.S. 385, 84 S.Ct. 397, 11 L.Ed.2d 404; **United States v. F. & M. Schaefer Brewing Co.** (1958) 356 U.S. 227, 78 S.Ct. 674, 2 L.Ed.2d 721.

#### **REASONS FOR GRANTING THE WRIT**

- 1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO THE PROPER INTERPRETATION OF RULE 62(b), F.R.C.P.**

Rule 62(b), F.R.C.P., provides that a District Court "may stay the execution of or any proceedings to enforce a judgment pending the disposition of

. . . a motion for relief from a judgment or order made pursuant to Rule 60."

The Fourth Circuit Court of Appeal held that while the simple filing of a Rule 60(b) motion does not affect the finality of the judgment or suspend its operation, where the district court orders its judgment stayed pursuant to Rule 62(b), there is no final appealable judgment until the stay is dissolved or the motion is ruled on. **Paxman v. Wilkerson** (4th Cir. 1974) 502 F.2d 1163 (table), 18 Fed.R.Serv.2d 1554.

In this case, the Ninth Circuit Court of Appeal held that a Notice of Appeal, filed promptly upon dissolution of the Rule 62(b) stay, was untimely.

The decision of the Ninth Circuit in this case directly conflicts with the decision of the Fourth Circuit. This

conflict places litigants attempting to resolve their Rule 60(b) claims, without forfeiting their right to appeal, in an untenable position. The motion to vacate the judgment under Rule 60(b) does not toll the time for filing the Notice of Appeal. Rule 60(b), F.R.C.P.; **Browder v. Director, Illinois Department of Corrections, supra.** The filing of a Notice of Appeal, however, divests the district court of jurisdiction to entertain the Rule 60(b) motion. **Petrol Stops Northwest v. Continental Oil Co.** (9th Cir. 1981) 647 F.2d 1005; cert. denied 454 U.S. 1098, 100 S.Ct. 672; **Contemporary Mission, Inc. v. United States Postal Serv.** (2d Cir. 1981) 648 F.2d 97; **Weiss v. Hunna** (2d Cir. 1963) 312 F.2d 711 cert. denied 374 U.S. 853, 83 S.Ct. 1920, 10 L.Ed.2d 1073.

Petitioners attempted to resolve this dilemma by obtaining a stay pursuant to Rule 62(b). The procedure Petitioners adopted in this case is reasonable. The district court retains jurisdiction over the judgment after entry but prior to the filing of an appeal. **Kirtland v. J. Ray McDermott & Co.** (5th Cir. 1978) 568 F.2d 1166.

Resolution of this conflict is necessary to clarify the relationship between Rule 62(b) F.R.C.P., and Rule 4(a), F.R.A.P., to avoid misunderstanding resulting in loss of the right to appeal, as exemplified by this case. This Court has recognized that granting of certiorari is warranted in cases involving the proper application of the federal rules of civil and appellate procedure. **Browder v. Director,**



Illinois Department of Corrections,  
supra; Hanna v. Plumer (1965) 380 U.S.  
460, 85 S.Ct. 1136, 14 L.Ed.2d 8; La Buy  
v. Howes Leather Co. (1956) 352 U.S.  
249, 77 S.Ct. 309, 1 L.Ed.2d 290,  
rehearing denied 352 U.S. 1019, 77 S.Ct.  
553.

**2. THE DECISION BELOW RAISES  
SIGNIFICANT AND RECURRING PRO-  
BLEMS CONCERNING APPELLATE  
JURISDICTION BASED ON THE  
UNIQUE CIRCUMSTANCES DOCTRINE.**

The Ninth Circuit's decision in this case reflects important statutory and policy considerations growing out of efforts to invoke appellate jurisdiction based on the unique circumstances doctrine. To what extent does the policy favoring termination of litigation reflected in Rule 4(a), F.R.A.P., offset

the policy of honoring a party's good faith reliance upon a judicial officer, reflected in the unique circumstances doctrine?

This Court has held that the appellate court has jurisdiction to decide an appeal where the notice was not filed within the period prescribed by Rule 4(a) in reliance upon conduct of the district court indicating that the time for appeal had been tolled as a result of a post-trial motion. **Thompson v. Immigration and Naturalization Service, supra**, (district court erroneously declared that post-trial motion was untimely); **Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.** (1962) 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (district court extended time for appeal

based on erroneous finding of excusable neglect).

The unique circumstances doctrine has been applied in various contexts to uphold appellate jurisdiction where the lower court had erroneously indicated that the appeal period had been extended. **Lieberman v. Gulf Oil Corp.** (2d Cir. 1963) 315 F.2d 403 (motion to extend time for appeal granted based on misunderstanding as to whether amendment of judgment tolled time for appeal); **Chipser v. Kohlmeyer & Co.** (5th Cir. 1979) 600 F.2d 1061 (remand to district court to determine existence of good cause where misapprehension of the meaning of a court order was compounded by misleading response by trial court); **Alvestad v. Monsanto Co.** (5th Cir. 1982)

671 F.2d 908 (accepted unique circumstances doctrine but found no unique circumstances exist where no evidence that appellant had been misled by the trial court); **Needham v. White Laboratories** (7th Cir. 1981) 639 F.2d 394 (district court erroneously determined that motion to reconsider post-trial order tolled time for appeal); **Martinez v. Trainor** (7th Cir. 1977) 556 F.2d 818 (accepted unique circumstances doctrine but found no unique circumstances where district court accepted defective post-trial motion, respondents having promptly pointed out the deficiencies); **United States v. Velez** (11th Cir. 1982) 693 F.2d 1081 (applied where bondsman relied on oral representations of magistrate in modifying bond agreement); **Seshachalam v. Creighton Univ. School of**

**Medicine** (8th Cir. 1976) 545 F.2d 1147, appeal dismissed 549 F.2d 79, cert. denied 433 U.S. 909, 97 S.Ct. 2974, 53 L.Ed.2d 1093 (remand to district court to determine existence of excusable neglect where appellant erroneously believed second post-trial motion tolled time for appeal); **Hernandez-Rivera v. Immigration and Naturalization Serv.** (9th Cir. 1979) 630 F.2d 1352 (applied where immigration court erroneously extended time for appeal); **National Industries Inc. v. Republic National Life Insurance Co.** (9th Cir. 1982) 677 F.2d 1258 (district court erroneously extended time pending resolution of Rule 60(b) claim); **Estate of Butler's Tire & Battery Co., Inc.** (9th Cir. 1979) 592 F.2d 1028 (applied where district court scheduled hearing on motion to extend

for a date beyond the appeal period); **Carlile v. South Routt School District RE3-J** (10th Cir. 1981) 652 F.2d 981 (applied to erroneous order tolling time for filing employment discrimination claim); **Inglese v. Warden, U.S. Penitentiary** (11th Cir. 1982) 687 F.2d 362 (district court erroneously determined that post-trial motion was timely).

In this case, however, the Ninth Circuit has implicitly rejected the doctrine of unique circumstances where the litigants were misled as to whether the district court's order staying the judgment pending resolution of the Rule 60(b) claim tolled the time for appeal. This decision conflicts with the decision of the Seventh Circuit in **Needham**, the Fifth Circuit in **Chipser**, and the Second Circuit in **Lieberman**

where litigants misapprehended the nature of a court order and where that confusion was compounded by a misleading response by the district court. The decision in this case is also difficult to reconcile with the decision of this Court in **Thompson** and the recent decision of the Eleventh Circuit in **Inglese** where litigants failed to file a timely appeal based on the district court's erroneous determination that the post-trial motion was timely. In each of these cases, the principle of honoring a party's good faith reliance upon a judicial officer prevailed where the misapprehension concerned the timeliness of the character of the post-trial motion. In the Ninth Circuit, however, this principle has apparently succumbed

to the goal of securing an end to litigation at all costs.

### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Ninth Circuit.

Respectfully submitted

ROBERT J. DAVIS  
LAW OFFICER OF  
ROBERT J. DAVIS

ALFRED A. CALABRO  
CALABRO, CALABRO & CALABRO

BY: ALFRED A. CALABRO

Attorneys For Petitioners



## DECLARATION OF ALFRED A. CALABRO

I, ALFRED A. CALABRO, DECLARE as follows:

1. I am an active member of the bar of the State of California and I am admitted to practice before this Court. I am a member of the law firm of Calabro, Calabro & Calabro, who together with Robert J. Davis, Esq., are counsel of record for Defendants-Appellants-Petitioners in this action, John C. Moon and Zion Industrial Corporation.

2. I make this declaration in support of this Petition for Writ of Certiorari.

3. I believe that the Exhibits set forth in support of this Petition contain true and accurate text of the relevant portions of the papers and pleadings from the District Court and

the Court of Appeal relating to this appeal. I further believe the facts related in the Petition are true and accurate.

4. That in keeping with Rule 21 (4), (5) of the revised rules for the Supreme Court, Declarant has sought to keep this petition "as short as possible." Petitioners have sought to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration by the Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 18th day of August, 1983 at North Hollywood, California.

BY:

  
ALFRED A. CALABRO

Attorney for Petitioners

## **APPENDIX A**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HYOSUNG AMERICA, INC.,

Plaintiff(s)

CASE NUMBER  
CV 81-4784-R

vs

JOHN C. MOON, et al.,

Defendant(s)

---

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR  
ATTORNEY(S) OF RECORD:

You are hereby notified that  
JUDGMENT in the above entitled case  
was entered in the docket on Oct 29  
1982.

You are also notified that if this  
case was tried and you introduced  
exhibits into evidence, they must be  
claimed at this office after the expir-  
ation of thirty days from the receipt of  
this notice. (After sixty days in cases

in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

Civ 26 (10/78)

NOTICE OF ENTRY

(Certificate Of Mailing Omitted)

## **APPENDIX B**

LAW OFFICES OF ROBERT J. DAVIS  
23501 Park Sorrento #212  
Calabasas, CA. 91302  
(213) 887-5300

Attorney for Defendants  
JOHN C. MOON and ZION  
INDUSTRIAL COPORATION

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HYOSUNG AMERICA, INC.,

Plaintiff,

vs.

JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION,

Defendants.

---

CASE NO.: CV 81 4784 R

EX PARTE MOTION TO VACATE  
ENTRY OF JUDGMENT OR IN  
THE ALTERNATIVE TO CHANGE  
THE DATE OF THE ENTRY OF JUDGMENT

TO: MANUEL L. REAL, JUDGE OF THE  
UNITED STATES DISTRICT COURT:

The defendants JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION hereby apply to

this Court on an Ex Parte basis for an order vacating the Entry of the Judgment herein, or in the alternative changing the date of entry of judgment to the date this Motion was filed.

This motion is based upon the grounds that the judgment herein was entered prematurely, was entered without proper notice to the defendants and is void (Rule 52(a), 58, 60(b) of the Federal Rules of Civil Procedure and Rule 7(a) of the Local Rules of Practice for the United States District Court, Central District of California).

Said motion is further based upon the file herein, the attached Declaration of Robert J. Davis, the Memorandum of Points and Authorities and such additional oral and documentary evidence as



may be presented at, or prior to, the hearing in this Ex Parte Motion,

It is further requested that pursuant to Rule 62(b) of the Federal Rules of Civil Procedure that the Court stay the execution of or any proceedings to enforce the judgment pending the disposition of this motion.

LAW OFFICES OF ROBERT J. DAVIS

BY:

---

ROBERT J. DAVIS  
Attorney for Defendants  
JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION

## **APPENDIX C**

DECLARATION OF ROBERT J. DAVIS

I, ROBERT J. DAVIS, do declare and state as follows:

1. I was the trial attorney for the defendants herein and still am the attorney of record for the defendants.
2. On October 28, 1982, I received in the mail from plaintiff's attorney the Proposed Judgment. I proceeded to prepare opposition to it. Noting that the Judgment was to be in accordance with the Court's findings of fact and conclusions of law separately filed in this action (item 15), which were not included in or a part of the document received on October 28, 1982. I contacted plaintiff's attorney to inquire of same. I was advised by Neil

Rubenstein that he had erroneously assumed the Court would be preparing its own findings of fact and conclusions of law and when he found out to the contrary he proceeded to prepare them and was in fact working on them at the time of my call. Mr. Rubenstein further advised that the findings of fact and conclusions of law would be messengered to me that day.

3. I left my office at or about 6:00 P.M. on October 28, 1982, having not received the findings of fact and conclusions of law. When I arrived at my office on October 29, 1982 I noticed the documents had been placed through the mail slot evidently between 6:00 P.M. on October 28, and 9:00 A,M, on October 29, 1982.

4. I then proceeded to further prepare

the opposition to the judgment, findings of fact and conclusions of law since those submitted were in the main contrary to the evidence as presented and the law thereabout. During my preparation of the opposition, I reread Local Rule 7(a) and Rules 52(a), 58 and 60(b) of the Federal Rules of Civil Procedure and concluded that the defendants had five days within which to file their opposition to the judgment, findings of fact and/or conclusions of law.

5. Accordingly, said opposition was timely filed with this Court on November 2, 1982. I assumed that November 2, 1982 would be the earliest date that the judgment would be signed and entered.

6. On November 3, 1982, at approximately 4:00 P.M., I collapsed while in my office. Paramedics from the Los

Angeles County Fire Department were summoned and I was eventually admitted to West Hills Hospital on that date for a possible heart attack and high blood pressure. I was subsequently released, ordered to stay away from my office and given medication - "Atenlonel" to take. The medication has the effect of making me very drowsy and dizzy at times, making it extremely hard to work in my office.

7. I returned briefly to my office on November 8, 1982 and noted for the first time pursuant to documents received from the Court and plaintiff's attorney that judgment herein had been entered by the Court on October 29, 1982, the date I first saw the proposed findings of fact and conclusions of law. I believe the Notice of Entry of Judgment was received

in my office on November 4, 1982, while I was away from it.

8. It is my belief that the judgment was entered prematurely, without allowing for the five day period of time as provided for in Local Rule 7(a) and Rules 52(a), 58 and 60(b) of the Federal Rules of Civil Procedure.

9. The instant request is made in order that the Court would have the opportunity to consider the objections to the judgment, findings of fact and conclusions of law filed November 2, 1982 and to allow the defendants the opportunity to timely file a motion for new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. A motion for new trial was not made within 10 days of the original date of the entry of judgment since there was no actual awareness of

the entry until the 10 day period had practically passed and although constructive knowledge was present at least as of November 4, 1982, counsel was unable to have actual knowledge of same or do anything about it due to the medical reasons cited above. Had the Judgment been entered pursuant to Local Rule 7(a) there would have been no necessity for this Motion.

10. It is requested that the entry of judgment herein be vacated or in the alternative that the date of entry of judgment be designated the date this motion is decided.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of November, 1982, at Calabasas, California.



/s/ Robert J. Davis

ROBERT J. DAVIS  
Attorney at Law

POINTS AND AUTHORITIES

1. INTRODUCTION

On October 20, 1982, the Court orally rendered judgment in favor of plaintiff herein and requested plaintiff's counsel to prepare the judgment. A copy of the proposed judgment was received by defendants on October 28, 1982. The proposed judgment and findings of fact and conclusions of law it is believed were filed with the Court on October 29, 1982. Defendants filed opposition to the judgment and findings of fact and conclusions of law on November 2, 1982

and subsequently received notice that the judgment had been entered on the date of filing, October 29, 1982.

2. THE ENTRY OF JUDGMENT WAS PRE-MATURE AND MUST BE VACATED

Rule 7(a) of the Local Rules of the Central District in California provides that prior to the entry of judgment in a case such as this counsel for the successful party shall prepare in a certain specified format findings of fact and conclusions of law. The judgment shall provide that it is in accordance with the findings of fact and conclusions of law. Rule 7(a) goes on to specifically state:

"Unless the Court otherwise directs, no document governed by

this rule will be signed unless opposing counsel shall have endorsed thereon an approval as to form, or shall have failed to serve and file with the Clerk, within five days after service of a copy thereof, as shown by endorsement on the original or by affidavit of service a statement of objections to form and the grounds thereof."

The judgment was received on October 28, 1982, the findings of fact and conclusions of law were served on October 29, 1982. It is not believed that the Court directed otherwise, therefore the earliest that judgment could have been entered was November 3, 1982, five days after October 29,

1982. Since the judgment was prematurely entered it must be set aside and vacated.

3. FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ARE A NECESSARY PART OF  
THE JUDGMENT

Rule 52(a) of the Federal Rules of Civil Procedure provides that "(i)n all actions tried upon the facts without a jury, or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58,"

As previously indicated, the findings of fact and conclusions of law were first served and filed on October 29, 1982. Since the findings of fact and

conclusions of law are a necessary part of the judgment, Rule 52(a), compliance with Local Rule 7(a) must be met.

4. THE COURT HAS THE AUTHORITY TO  
VACATE THE JUDGMENT

Rule 60(b) provides in its applicable part that:

"(O)n motion and upon terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertance, surprise or excusable neglect . . . (4) the judgment is void . . . (6) any other reason justifying relief from the operation of the judgment."

As set forth herein the entry of October 29, 1982 not only was premature but was in a manner that defendants were not able to timely file their objections nor request a new trial. Accordingly, it is once again requested that the relief sought herein be granted,

Pursuant to Rule 62(b) the Court does have the authority to stay the execution of or any proceedings to enforce the judgment herein pending disposition of the instant motion. Such stay is respectfully requested.

Respectfully submitted:

---

ROBERT J. DAVIS  
Attorney at Law

(Certificate of Mailing omitted)

## **APPENDIX D**

ROBERT J. DAVIS  
LAW OFFICES OF ROBERT J. DAVIS  
ALFRED A. CALABRO  
CALABRO, CALABRO & CALABRO  
23501 Park Sorrento #212  
Calabasas, CA 91302  
(213) 887-5300

Attorney for Defendants  
JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HYOSUNG AMERICA, INC.,

Plaintiff,

vs.

JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION,

Defendants.

LODGED  
1982 NOV 22  
PM 2:01  
CLERK, U.S.  
DISTRICT COURT  
CENTRAL  
DISTRICT  
OF CALIF.

---

CASE NO.:  
CV 81 4784 R

MOTION FOR ORDER VACATING JUDG-  
MENT, TO PERMIT CONSIDERATION OF  
DEFENDANTS' OBJECTIONS TO FIND-  
INGS OF FACT, CONCLUSIONS OF LAW,  
AND JUDGMENT, AND IF SUCH BE  
DENIED TO PERMIT DEFENDANTS TO  
FILE MOTION FOR NEW TRIAL.



TO: HYOSUNG AMERICA, INC., AND ITS  
ATTORNEYS OF RECORD:

TAKE NOTICE that on the \_\_\_\_ day of  
November, 1982, at the hour of \_\_\_\_ A.M.  
or as soon thereafter as counsel may be  
heard in the Courtroom of the Honorable  
Judge LAUGHLIN E. WATERS located in the  
United States Courthouse, Los Angeles,  
California, the Defendants, JOHN C. MOON  
and ZION INDUSTRIAL CORPORATION will  
move the Court for an Order Vacating the  
Judgment entered herein (or in the  
alternative to vacate and change the  
date of entry of Judgment) so as to  
permit the Court to consider the opposi-  
tion of Defendants to the proposed  
Findings of Fact, Conclusions of Law and  
Judgment, which opposition papers were  
filed with the Clerk of the Court and  
served on November 2, 1982, and if such

objections be overruled, to then permit Defendants to file a Motion for a New Trial.

The Motion will be made upon the following grounds:

1. That the Judgment herein was entered prematurely, was entered without property notice to the Defendants and is void under Rules 52(a), 58 and 60(b) of the Federal Rules of Civil Procedure and Rule 7(a) of the Local Rules of Practice for the United States District Court, Central District of California.

2. That there are compelling reasons justifying relief from the operation of the Judgment under Rule 60(b) occasioned by the physical disability of Robert J. Davis, Esq., the then sole attorney of record for Defendants in this case. That the said Robert J. Davis filed and

served opposition papers to the Findings of Fact and Conclusions of Law on November 2, 1982, and the following day, November 3, 1982, at approximately 4:00 P.M., collapsed and required emergency medical treatment. That the said Robert J. Davis remained disabled and could not effectively protect the rights of the Defendants or otherwise move the Court until after the time had expired within which the Defendants could file and serve documents in support of a Motion for a New Trial.

3. That it would be in the interests of justice to grant said Motion so as to permit the Defendants to have their opposition papers to the Findings of Fact, Conclusions of Law and Judgment considered by the Court, and if such objections be denied, then to permit

Defendants to file a Motion for a New Trial.

Said Motion will be based upon all of the papers, pleadings and records in the file herein, including but not limited to, those papers in opposition to the proposed Findings of Fact, Conclusions of Law and Judgment herein served upon opposing counsel and filed with the Clerk of the Court on November 2, 1982, the Ex Parte Motion to Vacate Entry of Judgment or in the Alternative to Change the Date of Entry of Judgment filed with the Clerk of the Court on or about November 10, 1982, a copy of which is attached hereto, together with the supporting Declaration of Robert J. Davis and Points and Authorities, and such additional oral and documentary

evidence as may be presented at, or prior to, the hearing of this Motion.

It is further requested that pursuant to Rule 62(b) of the Federal Rules of Civil Procedure, that the Court stay execution of said Judgment and any proceedings to enforce the Judgment pending the hearing of this Motion.

It is further requested that time for the service and hearing of this Motion be shortened as provided in the accompanying Application for Order Shortening Time.

DATED: November 20, 1982.

---

Alfred A. Calabro,  
of counsel for  
Defendants

(Certificate of mailing omitted.)

## **APPENDIX E**

ROBERT J. DAVIS  
LAW OFFICES OF ROBERT J. DAVIS  
ALFRED A. CALABRO  
CALABRO, CALABRO & CALABRO  
23501 Park Sorrento #212  
Calabasas, CA. 91302  
(213) 887-5300

Attorneys for Defendants  
JOHN C. MOON and ZION  
INDUSTRIAL COPORATION

HYOSUNG AMERICA, INC.,

Plaintiff,

vs.

JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION,

Defendants.

---

CASE NO.: CV 81 4784 R

EX PARTE

APPLICATION FOR ORDER SHORTENING  
TIME AND DECLARATION  
IN SUPPORT THEREOF  
AND REQUEST FOR STAY  
AND POINTS AND AUTHORITIES

L O D G E D  
1982 Nov 22 PM 2:01  
CLERK, U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIF.

COME NOW, the Defendants, JOHN C. MOON and ZION INDUSTRIAL CORPORATION and move the Court for an Order Shortening Time within which to file and serve their Motion for Order Vacating Judgment, to Permit Consideration of Defendants' Objections to Findings of Fact, Conclusions of Law, and Judgment, and if such be denied, to permit Defendants to file Motion for New Trial for the reasons and upon the grounds set forth in the attached Declaration of Alfred A. Calabro., Esq., and the Points and Authorities filed herewith. I have contacted opposing counsel and they do not consent to the granting of the relief requested.



Dated: November 22, 1982

/s/A. A. Calabro  
Alfred A. Calabro,  
of counsel  
for Defendants

## **APPENDIX F**

DECLARATION OF ALFRED A. CALABRO,  
ESQ., FOR ORDER SHORTENING TIME

ALFRED A. CALABRO DECLARES as follows:

1. That I am one of the attorneys for Defendants.

2. The proposed Judgment in this case was filed by counsel for Plaintiff on October 29, 1982.

3. The Court, Judge MANUEL REAL, signed the Judgment on the same date it was filed, October 29, 1982.

4. Rule 7(a) of the Rules for the Central District provide generally that unless the Court otherwise directs, no document will be signed unless opposing counsel shall have approved the same or shall have failed to serve and file with the Clerk of Court within five days

after service of a copy thereof a statement of objections to form and the grounds thereof.

5. Under Rule 7(a), the earliest the Judgment could have been signed and entered was November 3, 1982, five days after October 29, 1982.

6. Before the five days expired, Robert J. Davis, Esq., then sole counsel for Defendants filed and served written objections to the Findings of Fact, Conclusions of Law and Judgment.

7. On November 3, 1982, at approximately 4:00 P.M., Mr. Davis collapsed while in his office and was transported to West Hills Hospital by paramedics from the Los Angeles County Fire Department for a possible heart attack and high blood pressure problems. Mr. Davis was ordered by his doctor to stay away

from his office and was given medication - "Antenlonel" to take. The medication had the effect of making Mr. Davis drowsy and dizzy and by reason thereof, Mr. Davis could not attend to business matters in his office.

8. Mr. Davis returned briefly to his office on November 8, 1982, and noted for the first time from documents received during his absence that the Judgment had been signed and entered on October 29, 1982, in violation of Rule 7(a). The Court had not waited the five days required by the Rule. Because of his illness, Mr. Davis could prepare no papers to vacate the Judgment or a New Trial Motion.

9. On November 10, 1982, Mr. Davis filed and served an Ex Parte Motion to Vacate Entry of Judgment or in the

Alternative to Change the Date of Entry of Judgment. However, by reason of the absence of Judge REAL from the Court, said Motion has not yet been acted upon. I have been advised that Judge REAL is in Florida and not expected to return until December 6, 1982.

10. Because of the continued illness of Mr. Davis, Defendants requested that Declarant become associated with Mr. Davis as counsel for Defendants. Such association was made November 17, 1982, and the formal association papers are being filed concurrently with this Application.

11. That the time within which a Notice of Appeal must be filed in this case will expire thirty days from October 29, 1982, and by reason thereof, there is not sufficient time to give the

notice required by the Rules to Plaintiff of a Noticed Motion to Vacate the Judgment and for other relief on behalf of the Defendants.

12. That by reason thereof, Defendants respectfully request that the Court shorten the time within which notice must be given for the hearing of Defendants' Motion to Vacate Judgment and for other relief as reflected in the accompanying Motion papers, so that said Motion may be heard by a Judge of this Court prior to the expiration of the time within which a New Trial Notice of Appeal must be filed.

13. It is further respectfully requested that pending the hearing of said Motion that execution of the Judgment be stayed so that the status quo of

the parties may be maintained as of October 29, 1982.

14. That to grant said Order Shortening Time would be in the interests of justice.

I DECLARE under penalty of perjury that the foregoing is true and correct.

SIGNED at Glendale, California, this 20th day of November, 1982.

/s/ A. A. Calabro  
ALFRED A. CALABRO



## POINTS AND AUTHORITIES

A written notice, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown by made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served no later than 1 day before the hearing, unless the court permits them to be served at some other time. Federal Rules of Civil Procedure, Rule 6(d).

## **APPENDIX G**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV 81-4784-R

Date November 24, 1982

Title Hyosung America, Inc., -v- John  
C. Moon and Zion Industrial Corp.

DOCKET ENTRY

PRESENT:

HON. LAUGHLIN E. WATERS, JUDGE

Carolyn Jackson  
Deputy Clerk

-----  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

-----

ATTORNEYS PRESENT FOR DEFENDANTS:

-----

PROCEEDINGS:

THE COURT ORDERS the above entitled  
case and judgement hereon are stayed  
until December 13, 1982.

copies mailed to:

ROBERT J. DAVIS, ESQ.  
23501 Park Sorrento  
Suite 212  
Calabasas, CA 91302

KIM & CHANG  
700 South Flower Street  
Suite 2330  
Los Angeles, CA 90017

Initials of Deputy Clerk CJ

## **APPENDIX H**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV81-4784-R

Date December 13, 1982

Title Hyosung America, Inc. -v- John C.  
Moon, et al

---

DOCKET ENTRY

---

PRESENT:

HON. MANUEL L. REAL , JUDGE

Loyette Fisher

Deputy Clerk

Florence Carcia  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Robert Davis

ATTORNEYS PRESENT FOR DEFENDANTS:

Susan Hoffman

PROCEEDINGS: Defendant's Motion to vacate entry of judgment, or in the alternative to change date of entry of judgment.

Hearing held and Court denies the Defendant's motion to vacate entry of judgment or in the alternative to change date of entry of judgment.

Initials of Deputy Clerk /s/ F4

## **APPENDIX 1**



ROBERT J. DAVIS  
LAW OFFICES OF ROBERT J. DAVIS  
23501 Park Sorrento #212  
Calabasas, CA. 91302  
(213) 887-5300

ALFRED A. CALABRO  
CALABRO, CALABRO & CALABRO  
124 South Isabel Street  
Glendale, CA. 91205  
(213) 245-1846

Attorneys for Defendants JOHN C. MOON  
and ZION INDUSTRIAL COPORATION

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HYOSUNG AMERICA, INC.,

Plaintiff,

vs.

JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION,

Defendants.

---

CASE NO.: CV 81 4784 R

NOTICE OF APPEAL ON  
BEHALF OF DEFENDANTS

FILED  
Dec 13 10:50 AM '82  
CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
BY \_\_\_\_\_

NOTICE IS HEREBY GIVEN that defendants JOHN C. MOON and ZION INDUSTRIAL CORPORATION hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Final Judgement entered in this action on the 29th day of October, 1982, and stayed to the 13th day of December, 1982. Motion to vacate judgement denied 12-13-82.

DATED: December 13, 1982

ROBERT J. DAVIS  
LAW OFFICES OF ROBER J. DAVIS  
ALFRED A. CALABRO  
CALABRO, CALABRO & CALABRO

BY: \_\_\_\_\_  
ROBERT J. DAVIS  
Attorneys for Defendants  
JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION

(Certificate of Mailing omitted)

## **APPENDIX J**

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

HYOSUNG AMERICA, INC.,  
Plaintiff-Appellee,

vs.

JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION,  
Defendants-Appellants.

---

NO. 82-6099

(C.D. Cal.No.  
CV-81-4784-MLR)

MOTION TO DISMISS OR, IN  
THE ALTERNATIVE, TO LIMIT  
APPELLATE JURISDICTION

Pursuant to Rules 4(a) and 26(b),  
Federal Rules of Appellate Procedure  
("FRAP"), 28 U.S.C. § 2107, and Rule  
60(b), Federal Rules of Civil Procedure,

plaintiff-appellee Hyosung America, Inc. ("appellee") hereby moves for an order dismissing this appeal or, in the alternative, for an order limiting appellate jurisdiction.

This Motion is made on the grounds that (1) appellants' notice of appeal was filed more than thirty days after the date of entry of the judgment appealed from ("the underlying judgment"); (2) the Rule 60(b) motion filed by appellants and denied by the district court did not toll the running of the thirty-day period; and (3) appellants at no time filed a motion pursuant to Rule 4(a)(5), FRAP, for extension of the time in which to file their notice of appeal. At best, appellants' notice of appeal is timely and effective only as to the limited issue of whether the

district court abused its discretion in denying appellants' Rule 60(b) motion.

This Motion is based on the Memorandum of Points and Authorities attached hereto, the Proposed Order attached hereto, the pleadings and papers from the district court record included in the Appendix filed concurrently with this Motion, the records and files herein, and such other evidence and argument as may be presented at any hearing on this Motion.

Dated: April 15, 1983.

Respectfully submitted,

TUTTLE & TAYLOR Incorporated  
MILES N. RUTHBERG

By /s/Miles N. Ruthbert  
Miles N. Ruthberg  
Attorneys for Plaintiff-  
Appellee  
Hyosung America, Inc.

(Points and Authorities, Argument,  
Declaration of Miles N. Ruthberg,  
Proposed Order and Mailing Certificate  
omitted)

## **APPENDIX K**



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

HYOSUNG AMERICA, INC.,

Plaintiff-Appellee,

vs.

JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION,

Defendants-Appellants.

---

NO. 82-6099

(C.C. Cal.No.  
CV-81-4784-MLR)

OPPOSITION TO MOTION TO DISMISS  
OR, IN THE ALTERNATIVE, TO  
LIMIT APPELLATE JURISDICTION

Appellants oppose the motion on the grounds that: (1) The Stay of Judgment entered on November 24, 1982, pursuant to Rule 62(b) FRCP, tolled the running

of the thirty-day appeal period; (2) The appellate court has jurisdiction to decide an untimely appeal where appellant relied to his detriment on the district court's assurance that the time for appeal had been tolled; (3) The appellate court may remand an untimely appeal to the district court to determine whether the untimeliness of the appeal was due to excusable neglect, and alternatively, (4) An untimely appeal from a judgment may be treated as an appeal from denial of the post-trial motion.

This Motion is based on the Memorandum of Points and Authorities attached hereto, the documents from the district court record included in the Appendix filed with appellee's Motion To Dismiss, and such other evidence and argument as

may be presented at any hearing on this Motion.

Dated: May 2, 1983

Respectfully submitted,

ROBERT J. DAVIS  
LAW OFFICES OF  
ROBERT J. DAVIS  
ALFRED A. CALABRO  
CALABRO, CALABRO,  
CALABRO & CALABRO

By: ALFRED A. CALABRO  
Attorneys for Defendants-  
Appellants JOHN C. MOON  
and ZION INDUSTRIAL  
CORPORATION

(Points and Authorities, Argument and Certificate of Mailing omitted.)

## **APPENDIX L**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

HYOSUNG AMERICA, INCORPORATED,  
Plaintiff-Appellee,  
vs.

JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION,  
Defendants-Appellants.

---

No. 82-6099

DC# CV 81-4784-R MLR  
Central California

ORDER

**F I L E D**  
May 24 1983  
PHILLIP B. WINBERRY  
CLERK, U.S. COURT OF APPEALS

Before: WALLACE and SCHROEDER, Circuit  
Judges.

Appellee's motion for dismissal of  
the appeal is granted in part. The  
motion for relief under Fed. R. Civ. P,

60(b) and the subsequent stay of execution order did not toll the time for appeal from the underlying judgment. This appeal is therefore limited to the issue of whether the district court abused its discretion in denying the Rule 60(b) motion. See Fed. R. App. P. 4(a)(4); Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257, 263 n.7 (1978); Plotkin v. Pacific Telephone and Telegraph Co., 688 F.2d 1291, 1292 (9th Cir. 1982). The parties will contact a conference attorney to arrange a further prebriefing conference.

MoCal 5/16/83